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In The

Supreme Court of the United States

October Term, 1956

No ~~1043~~ ~~1044~~ 1046 150—153

NORTHWESTERN AUTO PARTS CO., Respondent,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD CO., Petitioner.

NORTHWESTERN AUTO PARTS CO., Respondent,
vs.
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO., Petitioner.

NORTHWESTERN AUTO PARTS CO., Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Petitioner.

NORTHWESTERN AUTO PARTS CO., Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction of This Court	2
Question Presented	3
Statutes Involved	3
Statement of Case	3
Reasons for Granting the Writ	9
(a) The Matter of Tariff Construction	9
(b) The Matter of Reasonableness	13
Conclusion	17
Appendix:	
Opinions of Lower Courts	19
Judgments Appealed From	36
Order Denying Joint Petition for Rehearing	40
Material Text of Statutes Involved	42

AUTHORITIES CITED

Cases:	Page
Allied Sales Co. v. B. & O. R. Co., 278 I.C.C. 560 (1950)	10
American Steel Abrasives Co. v. Erie R. Co., 273 I.C.C. 127 (1948)	10
Apex Tire & Rubber Co. v. B. & O. R. Co., 280 I.C.C. 552 (1951)	10
Atchison Leather Products Co. v. A. T. & S. F. Ry. Co., 274 I.C.C. 328 (1949)	10
Atchison, T. & S. F. Ry. Co. v. United States ex rel. Sonken Galamba Corp. (8 Cir. 1938), 98 F.2d 457	12
Crancer v. Lowden, 315 U.S. 631, 62 S.Ct. 763, 86 L.Ed. 1077 (1942)	11
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922)	11, 17
Klotz Bros. v. Chesapeake & Ohio Ry. Co., 177 I.C.C. 557 (1931)	10
Lapides Metals Co. v. B. & M. R. Co., 278 I.C.C. 214 (1950)	10
Larrimore, Inc., v. Union Pac. R. Co., 273 I.C.C. 415 (1948)	10

	Page
Myers Tire Supply Co. v. Akron, Canton & Y. R. Co., 274 I.C.C. 107 (1950)	10
Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co. (D. Minn. 1956), 139 F. Supp. 521	7
Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co. (8 Cir. 1957), 240 F.2d 743	7
Penn R. Co. v. Fox and London, Inc. (2 Cir. 1938), 93 F.2d 669; cert. denied, 304 U.S. 566, 58 S.Ct. 949, 82 L.Ed. 1532 (1938)	12
H. P. Randall Mfg. Co. v. A. & S. R. Co., 269 I.C.C. 655 (1948)	10
Reliable Jobbers & Shoe Co., Inc., v. Atchison, T. & S. F. Ry. Co., 284 I.C.C. 72 (1952)	10
Sonken-Galamba Corp. v. Atchison, T. & S. F. Ry. Co. (8 Cir. 1942), 124 F.2d 952	12
Sonken-Galamba Corp. v. Union Pac. R. Co. (10 Cir. 1944), 145 F.2d 808	12
Terminal R. Ass'n of St. Louis v. United States, 266 U.S. 17, 45 S.Ct. 5, 69 L.Ed. 150 (1924)	14, 15
Texas and P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 5 L.Ed. 553 (1907)	15
Tillman & Levenson v. L. & N. R. Co., 272 I.C.C. 681 (1948)	10
United States v. Western Pacific R. Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)	7, 9, 10, 11, 13, 14, 15, 16, 17

Statutes:

	Page
28 U.S.C., Sec. 1254(1)	2, 3, 42
28 U.S.C., Sec. 1337	3, 42
49 U.S.C., Sec. 1	2-3
49 U.S.C., Sec. 9	3, 15, 16, 42
49 U.S.C., Sec. 16(3)(a)	3, 16, 42

Miscellaneous:

Consolidated Freight Classification No. 20, Item 2815	4
Consolidated Freight Classification No. 20, Items 25455 and 25456	4

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Supreme Court of the United States:

Petitioners, Chicago, Burlington & Quincy Railroad Co., Chicago, Milwaukee, St. Paul & Pacific Railroad Co., Great Northern Railway Company, and Minneapolis & St. Louis Railway Company respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above entitled causes on the 17th day of January, 1957. Said causes involve identical questions and were consolidated for consideration in the lower courts; therefore one petition will cover all cases herein.

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota is reported at 139 F. Supp. 521 and that of the United States Court of Appeals for the Eighth Circuit at 240 F.2d 743. Both are appended to the within petition.

JURISDICTION OF THIS COURT

The judgments sought to be reviewed were entered in the United States Court of Appeals for the Eighth Circuit on January 17, 1957. On February 4, 1957, within the time allowed by Rule 15(a), *Rules*, United States Court of Appeals for the Eighth Circuit, Joint Petition of Appellant and Appellees for Rehearing was filed in the court below. Rehearing was denied by the lower court's order of March 4, 1957.

The jurisdiction of this Court to review the judgments below by writ of certiorari is contained in Title 28, *U.S.C.*, Section 1254(1), and is upon the basis that a federal question is presented of extreme importance in the administration of the Interstate Commerce Act, Title 49, *U.S.C.*, Sec-

tion 1, et seq., determination of which is essential to the uniform adjudication of controversies in respect to the payment of interstate freight charges.

QUESTION PRESENTED

In actions at law by a shipper against rail carriers for recovery of alleged freight overcharges where the particular tariffs at issue have been construed and clarified in prior releases and opinions of the Interstate Commerce Commission and courts on numerous occasions, and where the shipper has stipulated that no issue of reasonableness of the rates is raised or intended, does the Court have jurisdiction to apply the proper tariff in reliance on existing administrative precedent without referring the cases to the Commission under the exclusive primary jurisdiction doctrine?

STATUTES INVOLVED

Title 28, *U.S.C.*, Section 1337.

Title 28, *U.S.C.*, Section 1254(1).

Title 49, *U.S.C.*, Section 9.

Title 49, *U.S.C.*, Section 16(3)(a).

(Verbatim text of the material portion of the foregoing statutes is included in the Appendix.)

STATEMENT OF CASE

Respondent brought four actions in the United States District Court for the District of Minnesota to recover $22,913.53 alleged freight overcharges arising out of the interstate transportation by rail of 28 carloads of automotive parts. The basis of Federal jurisdiction in the District Court was Title 28, *U.S.C.*, Section 1337, and Title 49, *U.S.C.*, Section 9. The sole issue raised and intended by the pleadings was as to the nature and character of the commodity

transported for rating purposes, it being plaintiff's contention that the material was "scrap iron or steel having value for remelting purposes only" as provided in *Consolidated Freight Classification No. 20, Items 25455 and 25456.* The carriers defended on the ground that the applicable tariff rating was that for "automobile parts and automobile engine parts, other than automobile bodies, old, used, having value for reconditioning," pursuant to *Consolidated Freight Classification No. 20, Item 2815.* As will be more specifically commented upon, there was no issue raised or intended as to the reasonableness of the rates involved.

The parties entered into the following stipulation of facts relating to the physical nature and characteristic of the material transported in order that the law question of tariff application might be determined on motion for summary judgment:

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective attorneys that for the sole purpose of defendants' Motion for Summary Judgment, the following facts may be accepted as true and correct; and in the event that said Motion is denied, it is understood that none of said statements in this Stipulation shall be binding upon any of the parties nor shall in any way be construed as an admission against them.
>
> "1. The general nature of plaintiff's business includes the handling of parts for obsolete vehicles, such as Army vehicles which are no longer being manufactured. It purchases new and used parts surpluses from the Government and companies that are scrapped or obsolete in their stocks and tries to merchandise them. Such purchases are brought to a yard maintained in Minneapolis. Shipments are loaded at point of purchase with no attempt at segregation or sorting. Upon arrival at Minneapolis the shipments are unloaded and certain portions of each shipment are scrapped upon arrival. The balance of such shipments are stored for

future disposition either through scrapping or reconditioning. Plaintiff does not have facilities for smelting and whenever any part of a shipment is scrapped, whether upon arrival or at a later date, the same is sold to scrap jobbers.

"2. The shipments involved in the pleadings were purchased from the United States Army as the result of published lists of material by the Government which were obsolete and overstocked on behalf of the Government or which, because of condition, were no longer of useful service. The material is listed only by general description and purchases are made on the basis of competitive bids submitted by prospective purchasers. Bids submitted by plaintiff are on a tonnage or poundage basis in competition with regular scrap iron and steel dealers and are usually slightly higher than the then prevailing market price of scrap, except that on some occasions it would be substantially higher.

"3. Said shipments were purchased from the Army for the purpose of movement to the yard of plaintiff in Minneapolis. It was the intention of plaintiff to recondition and sell as automotive parts so much of each shipment as might become economically feasible and practical. After the shipments have been stored, there are periodic checks at irregular intervals and additional amounts are scrapped. Substantial amounts of parts have the physical capacity to be reconditioned, but the following factors will determine from time to time the decision as to whether to recondition or scrap:

"(a) Anticipated market for reselling.
(b) Receipt of order for particular parts.
(c) Economic cost of reconditioning.
(d) Sufficiency of reserve capital.
(e) Condition of the scrap market.
(f) Amount of plaintiff's storage space.
(g) Physical condition of the parts.
(h) Size of stock of particular parts on hand.

"4. All of the units in said shipments maintain their original identity at the time of shipment and ultimately are either scrapped or reconditioned for sale as

automotive parts. Many of the units upon arrival in Minneapolis are so rusty and worn, or otherwise unfit for use, as to make it impractical economically to recondition them.

"5. Plaintiff has no records to establish with accuracy the quantity of each shipment which has been sold for scrap or which has been reconditioned and sold as automotive parts. The balance of such shipments on hand in plaintiff's storage yard is being kept by plaintiff awaiting future decision as to what shall be scrapped and what shall be reconditioned and sold. Plaintiff's experience in similar shipments over the years is such that on the average approximately ten per cent (10%) of shipments are reconditioned and sold as automotive parts and ninety per cent (90%) are eventually sold for scrap.

"6. Originally, similar shipments moved by rail from point of purchase by plaintiff to its yard at Minneapolis under the classification of 'Scrap, Auto Parts.' Later, other similar shipments were reclassified as 85% Scrap Iron and Steel and 15% Used Auto Parts for reconditioning purposes only. In some instances involved herein the material was described in the Bills of Lading as 'auto parts and engine parts, old, used, having value for reconditioning.' In other instances the material was originally described as 'scrap iron, etc.' but as to the latter shipments, the defendant railroads changed the Bills of Lading to read 'auto parts and engine parts, old, used, having value for reconditioning.' In every case plaintiff paid the higher rate based on the latter classification and this action seeks recovery of the difference between the rate paid and the lower rate applicable to 'scrap iron, etc.'

"IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that defendants' Motion for Summary Judgment may be submitted to the Court herein; and in the event that the Court or either party wishes oral argument, the parties will stipulate to a time and place at the Court's convenience for submission of said argument; and that upon the filing of said Motion, defendants shall have seven (7) days in which

to submit a written brief and plaintiff shall have seven (7) days in which to answer said brief. Defendants shall then have three (3) days in which to reply to plaintiff's brief.

"Dated this 21st day of March, 1956."

The District Court granted defendants' motions for summary judgment on the basis that the stipulated nature and character of the goods precluded application of the scrap rate as a matter of law. *Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co.* (D. Minn. 1956), 139 F. Supp. 521. The Court expressly stated in its opinion that there was no issue of reasonableness in the case. 139 F. Supp. 521, 523. On appeal by plaintiff to the Court of Appeals for the Eighth Circuit, the sole assignment of error was that the determination of the nature and character of the commodity was a fact question, notwithstanding the stipulation of facts, and that plaintiff was entitled to a trial on the merits, therefore rendering summary judgment improper. Defendant carriers again contended that there was no genuine issue of material fact in the case and that under the Interstate Commerce Commission's interpretations of the scrap tariffs, the stipulated facts precluded application of the scrap iron rate to plaintiff's commodity under any circumstances. Again, the issue of reasonableness of the rates was not argued. In decision of January 17, 1957, the summary judgments appealed from were reversed and the cases remanded to the District Court with directions to refer the controversy to the Interstate Commerce Commission. *Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co.* (8 Cir. 1957), 240 F.2d 743. In so holding, the Court of Appeals held that it was compelled to reach this conclusion by the recent decision of this Court in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), which was filed about two weeks after submission of the

present cases to the Court of Appeals. It was held that the instant cases presented questions of tariff construction and reasonableness of rate within the exclusive primary jurisdiction of the Commission. The Court of Appeals said (240 F.2d 743, 749):

> "All that the Supreme Court said in the Western Pacific case (77 S.Ct. 165) as to the necessity for 'expert and specialized knowledge' in that case is applicable here, and it must be held here in accord with the teaching of the Western Pacific case that the question of the tariff construction, as well as that of the reasonableness of the tariff as applied, are within the exclusive primary jurisdiction of the Interstate Commerce Commission."

Since all parties to these actions, including plaintiff, considered that there was sufficient administrative and judicial precedent as to the construction and application of scrap tariffs to permit the lower courts to pass upon the issue of tariff application here, and since the parties had not considered and plaintiff did not intend that reasonableness be an issue in the case, Joint Petition of Appellant and Appellees for Rehearing was filed inviting the attention of the Court of Appeals to these matters and requesting modification of the judgments and the opportunity to be heard as to the factor upon which the Court's decision turned. Rehearing was denied by the lower court's order of March 4, 1957.

REASONS FOR GRANTING THE WRIT

While the opinion of the court below indicates adherence to the recent decision of this Court in *United States v. Western Pacific R. Co., supra*, analysis of the single issue involved and of the reasoning and holding of the lower court demonstrates clearly that the *Western Pacific* decision was actually misinterpreted and misapplied to the present cases by the lower court. There is also irreconcilable conflict between the judgments sought to be reviewed and other decisions of this Court differentiating jurisdiction and function of the Interstate Commerce Commission from that of the courts and apparent conflict with the decisions in other circuits dealing specifically with the judicial function in cases involving the application of scrap tariffs.

(a) The Matter of Tariff Construction.

The *Western Pacific* decision involved construction of the tariff for "incendiary bombs" to determine whether steel aerial bomb cases filled with napalm gel but without bursters and fuses took the rate for incendiary bombs or the lower rate applicable to "gasoline in steel drums." The resolution of this issue was dependent upon the evaluation of complex traffic matters and transportation cost factors requiring specialized knowledge and technical understanding and for that reason the controversy was referred to the Interstate Commerce Commission for administrative construction of the "incendiary bomb" tariff. It is assumed that, *unlike the instant cases*, the Court was without the benefit of administrative precedent, the "incendiary bomb" tariff *not* having been previously construed in the reported decisions of the Interstate Commerce Commission. But in holding that the doctrine of exclusive primary jurisdiction required referral to the Commission for interpretation of the tariff, this Court

was careful to make the following cautionary statement (352 U.S. 59, 69):

> "By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in Great Northern R. Co. v. Merchants Elevator Co., supra, which call for decision based on the particular facts of each case. *Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it.* See Crancer v. Lowden, 315 U.S. 631, 62 S.Ct. 763, 86 L.Ed. 1077." (Italics supplied.)

The distinction between the instant cases and the *Western Pacific* decision, which places the judgments below in direct conflict with the decisions of this Court, is that here *the question of tariff construction has been passed upon by the Commission on numerous prior occasions.* Briefs of the parties filed in the District Court and in the Court of Appeals invited attention and relied upon many of the decisions of the Commission, construing, interpreting and applying the same and similar tariffs as those involved in these cases. See *Klotz Bros. v. Chesapeake & Ohio Ry. Co.*, 177 I.C.C. 557, (1931); *H. P. Randall Mfg. Co. v. A. & S. R. Co.*, 269 I.C.C. 655 (1948); *Reliable Jobbers & Shoe Co., Inc., v. Atchison, T. & S. F. Ry. Co.*, 284 I.C.C. 72 (1952); *Apex Tire & Rubber Co. v. B. & O. R. Co.*, 280 I.C.C. 552 (1951); *Lapides Metals Co. v. B. & M. R. Co.*, 278 I.C.C. 214 (1950); *Myers Tire Supply Co. v. Akron, Canton & Y. R. Co.*, 274 I.C.C. 187 (1950); *American Steel Abrasives Co. v. Erie R. Co.*, 273 I.C.C. 127 (1948); *Allied Sales Co. v. B. & O. R. Co.*, 278 I.C.C. 560 (1950); *Larrimore, Inc., v. Union Pac. R. Co.*, 273 I.C.C. 415 (1948); *Tilliman & Levenson v. L. & N. R. Co.*, 272 I.C.C. 681 (1948); *Atchison Leather Products Co. v. A. T. & S. F. Ry. Co.*, 274 I.C.C. 328 (1949). Each of the

foregoing is a reported decision of the Commission defining and construing a scrap tariff and it was in reliance on these administrative precedents that the District Court held the scrap iron rate inapplicable to the commodity in question.

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922), which was cited, quoted, and followed in the *Western Pacific* decision, was apparently the first decision of this Court to clearly delineate the judicial and the administrative function in cases of this kind. It was there held (259 U.S. 285, 290, 292):

> "* * * Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. * * * But where the document to be construed is a tariff of an interstate carrier, and before it can be construed, it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. * * *"

There having been "preliminary determination" of the scrap tariffs within the meaning of *Great Northern Ry. Co. v. Merchants Elevator Co., supra*, and "prior releases or opinions" of the Commission having "already construed the particular tariff at issue" within the above quoted language of the *Western Pacific* decision, it is clear that there is no justification for referring the present cases to the Commission and that it was within the jurisdiction of the District Court to apply the proper tariff.

It is also extremely significant that Crancer v. Lowden, 315 U.S. 631, 62 S.Ct. 763, 86 L.Ed. 1077 (1942), *which was cited in the above quoted language of the Western Pacific decision as illustrative of a situation in which there would be no necessity for referral to the Commission, was a decision*

involving judicial application of the scrap iron tariff and in a situation not unlike the cases at bar, the Court held (315 U.S. 631, 635):

> "* * * *The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them.* * * *" (Italics supplied.)

As was noted by the lower court, 240 F.2d 743, 747, "the controversy is in a field that has been productive of considerable litigation," and since the scrap tariffs have received administrative construction and interpretation so fully, the courts have never felt constrained to refer this class of cases to the Commission for additional enlightenment but have consistently resolved questions of applying scrap tariffs to given commodities in reliance upon existing administrative precedent. See *Sonken Galamba Corp. v. Union Pac. R. Co.* (10 Cir. 1944), 145 F.2d 808; *Sonken-Galamba Corp. v. Atchison, T. & S. F. Ry. Co.* (8 Cir. 1942), 124 F.2d 952; *Atchison, T. & S. F. Ry. Co. v. United States ex rel. Sonken Galamba Corp.* (8 Cir. 1938), 98 F.2d 457, and *Penn R. Co. v. Fox and London, Inc.* (2 Cir. 1938), 93 F.2d 669, Cert. denied, 304 U.S. 566, 58 S.Ct. 949, 82 L.Ed. 1532 (1938), where the same type of question was presented and the Court held at pages 670-671:

> "* * * Properly speaking, no construction of a tariff is involved where the only controversy is whether the commodity shipped is one or another of two things plainly classified. * * *"

When examined from this standpoint, it is apparent that the decision below is also in conflict with the decisions of other circuit courts in scrap cases.

It is respectfully submitted that if the decision sought to be reviewed is permitted to stand, the stated qualification to

the holding in the *Western Pacific* decision is violated and the historic concept of the judicial function in this important class of cases is virtually destroyed. If the courts are powerless to pass upon the present controversy without administrative assistance, then it is doubtful that there can be any case involving the construction and application of a tariff that is cognizable in the courts, and every action with respect to freight charges must first be referred to the Commission notwithstanding the fact that there may be a multitude of prior Commission opinions interpreting and clarifying the particular tariff involved.

(b) The Matter of Reasonableness.

As a collateral reason for referral of the cases at bar to the Commission, the lower court apparently assumed that the question of reasonableness was at issue. The Court said (240 F.2d 743, 748):

> "But manifestly, the plaintiff's position is that if the tariff should be so construed and applied to these shipments, it would be unreasonable and violative of the intent of the Act. The broad pleading that the proper rate was a certain sum (which was the rate for scrap) left it open to the plaintiff to so contend."

The record makes it clear that plaintiff had no intention of injecting the issue of reasonableness into these cases. The pleadings were silent in this regard and reasonableness was not mentioned in the briefs or oral arguments of the parties in either of the lower courts. The absence of this issue was expressly recognized by the District Court (139 F. Supp. 521, 523):

> "There is no question presented here, nor can there be, as to the reasonableness of the rates charged. That is not within our province. * * *"

Following its decision herein, the parties invited the attention of the Court of Appeals to the absence of any issue of reasonableness in a joint petition for rehearing filed by and on behalf of all parties to the actions. The parties stated in this petition for rehearing:

> "* * * It was not the intention of appellant to raise any issue by the pleadings or otherwise as to the reasonableness of the rates involved or the reasonableness of applying the used automotive parts tariff to the commodities shipped, the sole issue being as to the proper tariff classification of the material." (Joint Petition of Appellant and Appellees for Rehearing, p. 2), and: "Appellant joins this petition for the purpose of eliminating from the issues the question of reasonableness of rate and requests the court to rule on the matter of summary judgment irrespective of this question." (Joint Petition of Appellant and Appellees for Rehearing, p. 3.)

By denying rehearing and modification of the judgments, the parties are being compelled to litigate the issue of reasonableness against their will and it is submitted that nothing in the *Western Pacific* decision requires or *permits* this result. The *Western Pacific* decision was an action by a carrier against the United States as shipper to recover additional freight charges. One of the grounds upon which the shipper defended was the alleged unreasonableness of the rate sought to be applied by the carriers (352 U.S. 59, 61-62). This being a permissible and competent defense and the court having no rate-making authority and therefore no jurisdiction to pass upon the issue of reasonableness, *Terminal R. Ass'n. of St. Louis v. United States*, 266 U.S. 17, 45 S.Ct. 5, 69 L.Ed. 150 (1924), it was quite properly held that this issue be referred to the Commission for determination. However, the present cases present a much different situation, since this is an action by a shipper to recover alleged overpayment of

freight charges only, instituted at law by choice. Title 49, *U.S.C.*, Section 9, affords an aggrieved shipper a choice of remedies and forums. He may either bring an action at law as plaintiff did in the instant cases for recovery of alleged overcharges only, or he may file complaint with the Commission to determine the reasonableness of the rate and to obtain reparation as to overcharges alleged to have previously accrued. By virtue of bringing his action at law, the shipper makes an election of remedies and excludes the issue of reasonableness from the case.

> "* * * It is well settled as a general rule that the question of reasonableness of rates * * * will not be considered by the courts before application has been made to the Commission. * * *" *Terminal R. Ass'n of St. Louis v. United States, supra*, 266 U.S. 17, 31; see *Texas and P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 5 L.Ed. 553 (1907).

To use the language of the Interstate Commerce Act, Title 49, *U.S.C.*, Section 9:

> "* * * But such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

This election of remedy was made in the instant cases. The issue of reasonableness was removed from the controversy by plaintiff's election when the actions were commenced in District Court instead of before the Commission. When the opinion of the lower court raised the reasonableness issue, it was expressly stated to that Court in the parties joint petition for rehearing that no such issue was involved or intended. It is therefore clear that while the Commission is the proper forum to determine a complaint as to reasonableness of a rate and while the primary jurisdiction doctrine requires reference to the Commission in cases like *United States v. Western Pacific R. Co., supra*, where a shipper

defends an action to recover freight charges upon the ground of reasonableness or where a question of tariff construction never before passed upon by the Commission is presented, it is quite another matter to judicially require that the reasonableness of the rate be determined in cases like these where a shipper is plaintiff in an action at law and has specifically excluded any issue of reasonableness from consideration by his election of remedy and forum, as well as by his express stipulation and where, as here, the tariff has been defined, construed and clarified by the Commission in many cases.

If the decision below is not modified, not only must there be a reference to the Commission in *every* action at law by a shipper for the simple recovery of overcharges thereby depriving the shipper of the choice of forum and remedy expressly conferred upon him by the Interstate Commerce Act, Title 49, *U.S.C.*, Section 9, but the same result would of necessity obtain in the multitude of actions brought every year in state and federal courts by carriers for the collection of their tariff charges. In the great majority of such cases there is no unique question of tariff construction and no issue of reasonableness of the rates. They are merely collection cases in which, for one reason or another, a shipper or receiver of freight has been reluctant or unable to part with his money. In these cases the carrier does not have the same choice of forum given to the shipper but must institute an action in state or federal court to recover its charges, Title 49, *U.S.C.*, Section 16(3)(a). The interpretation placed upon the *Western Pacific* decision by the lower court creates substantial doubt as to whether a court may *ever* entertain such a cause of action without insisting upon preliminary determination of each case by the Commission. Such a policy will result in triple handling of each case—first in a court of law, then to the Commission, and finally back to the court for

final judgment and enforcement. It is submitted that such a result ignores the Congressional mandate of the Interstate Commerce Act, disregards *Great Northern Ry. Co. v. Merchants Elevator Co., supra,* and the express language of the *Western Pacific* decision and creates an impractical and intolerable system for the administration of freight charge litigation.

CONCLUSION

Until such time as the Congress sees fit to amend the remedial portions of the Interstate Commerce Act, it is the duty of the courts to enforce its clear meaning. The decision sought to be reviewed raises a federal question of the utmost importance to shippers and carriers alike and creates an innovation in the field of rate litigation which renders meaningless the plain language of the Act. If the courts are powerless to apply the often-construed scrap tariffs in a case in which reasonableness is not in issue, then the courts are relegated to the role of performing merely ministerial duties in these cases. Confusion and uncertainty will exist in this class of litigation which is likely to result in time-consuming delay to the courts and parties, unjustified expense, and congestion of Commission dockets. The judgments below conflict with the clear admonition of this Court in the *Western Pacific* decision as to the types of cases in which administrative referral is unnecessary, and with other decisions of this Court and of other circuits. Upon these grounds we respectfully urge that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX

OPINIONS OF LOWER COURTS

Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co., et al (D. Minn. 1956), 139 F. Supp. 521.

This is an action brought by a shipper against four railroads to recover alleged excessive freight rates paid. The facts have been stipulated. Defendants move for summary judgment.

Plaintiff is engaged in the business of acquiring, reconditioning, rebuilding and marketing used automotive parts. From October, 1953, to April, 1954, plaintiff consigned and shipped to itself in Minneapolis, Minnesota, 28 carloads of obsolete vehicle parts which plaintiff had purchased from the United States Army as surplus. Plaintiff had obtained the material by bidding in competition with regular scrap iron and steel dealers. The shipments were delivered to plaintiff in Minneapolis by the four defendant railroads at various times between the dates mentioned.

The defendant railroads assessed and received from plaintiff freight charges applicable to the freight tariff rating for "auto parts and engine parts other than auto bodies, having value for reconditioning."[1] Plaintiff contends that this freight rate is inapplicable to the material shipped and that the proper one is that lower rate which is applicable to "scrap iron or steel having value for remelting purposes only."[2] Plaintiff seeks to recover $22,913.53, representing the difference between the freight rate actually paid by it and the lower rate for scrap iron or steel.

This court has original jurisdiction of this kind of proceeding. 28 U.S.C.A., Sec. 1337; 49 U.S.C.A., Sec. 9; *Atchison, T. & S. F. Ry. Co. v. United States ex rel. Sonken Galamba Corp.*, 8 Cir. 1938, 98 F.2d 457.

There is no question presented here, nor can there be, as

[1]Consolidated Freight Classification Number 20, Item 2815.

[2]Consolidated Freight Classification Number 20, Items 25455 and 25456.

to the reasonableness of the rates charged. That is not within our province. 49 *U.S.C.A.*, Sec. 15(1); *Terminal R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 45 S.Ct. 5, 69 L.Ed. 150 (1924). The sole issue is as to the nature of the material shipped for rate purposes. This is the only issue the court is empowered to decide. See *Sonken Galamba Corp. v. Union Pac. R. Co.*, 10 Cir. 1944, 145 F.2d 808.

The principle governing this kind of case is adequately stated in *Sonken Galamba Corp. v. Union Pac. R. Co., supra*, at p. 812:

> "* * * It is * * * plain that the nature and character of each shipment at the time tendered [for shipment] determines its status for rate purposes, and the use which may be subsequently made of the material does not control the question whether the shipment has a recognized commercial value."

See also *Crancer v. Lowden*, 8 Cir. 1941, 121 F.2d 645, 649, affirmed on other grounds, 315 U.S. 631 (1952); *Larrimore Inc. v. Union Pac. R. Co.*, 273 I.C.C. 415; *Lapides Metals Co. v. B. & M. R. R. Co.*, 278 I.C.C. 214.

This principle seems particularly appropriate in this case. It appears from the stipulation of facts that the plaintiff's experience in the past has been that approximately 10% of the automotive parts shipped is reconditioned and that eventually 90% is sold for scrap. Plaintiff has no records with which to corroborate these percentages. It also appears from the stipulation of facts that the ultimate use by the plaintiff of the vehicle parts, whether for reconditioning or scrap, depends not entirely upon the physical condition of the parts, but also upon such unpredictable factors as the condition of the markets for scrap and automotive parts, the demand for particular parts, the cost of reconditioning, storage space, stock on hand of particular parts, and the sufficiency of reserve capital. None of these factors, save the physical condition of the parts, can be determined at the time of shipment, and it is self evident that classification of materials for rate purposes cannot depend upon events which occur after shipment and which may occur in varying degrees. Hence, the inquiry must be directed to the nature and condition of the automotive parts purchased by plaintiff

from the United States Army at the time these parts were tendered for shipment. *Sonken Galamba Corp. v. Union Pac. R. Co., supra; Atchison Leather Products Company v. A. T. & S. F. R. Co.*, 274 I.C.C. 328; *Reliable Jobbers & Shoe Co., Inc., v. A. T. & S. F. R. Co.*, 284 I.C.C. 72.

The rate-making and regulatory body has by apt and revealing words defined "scrap iron" as used in its prescribed tariff as that class of metal which has value for remelting purposes only;[3] and it has amplified that definition by describing "scrap iron" as consisting of "old, worn out, obsolete, broken and cut iron, or dismantled machinery, and parts thereof, entirely unfit for original use and having no commercial value except for remelting purposes." *Klotz Bros. v. Chesapeake & Ohio*, 177 I.C.C. 557. See also *United States ex rel. Sonken Galamba Corp. v. Missouri-Kansas-Texas R. Co.*, 21 F. Supp. 931, affirmed, 8 Cir. 1938, 98 F.2d 457; Vol. 38, Words and Phrases, Perm. Ed., p. 364.

The Interstate Commerce Commission stated in *H. P. Randall Mfg. Co. v. Alton & S. R.*, 269 I.C.C. 655, 657:

> "The Commission has found in numerous proceedings that where a commodity has a utility in its original form it cannot be considered scrap."

The parties have stipulated that "substantial amounts of parts have the physical capacity to be reconditioned" and that "all of the units in said shipments maintain their original identity at the time of shipment." There is no indication that any considerable amount of the vehicle parts were broken down, cut or dismantled; the Court is, in fact, lead to the opposite conclusion that most, if not all, of the parts shipped, were whole and complete, and that a substantial amount of the parts had utility in their present form. Since substantial amounts of the automotive parts have the physical capacity to be reconditioned, and since the rate is determined from the inherent character of the article and is unaffected by the use to which put, it follows that substantial amounts of the automotive parts have economic value for

[3] Consolidated Freight Classification Number 20, Items 25455 and 25456.

purposes other than remelting and cannot be considered as scrap iron or steel.

Plaintiff has argued that regular scrap iron and steel dealers also purchased from the United States Army the same type of material that plaintiff purchased, and, it is contended, the rate for scrap iron or steel would be applicable to shipments tendered by these dealers. Plaintiff then argues that the nature of the material shipped by the scrap dealers and by plaintiff is identical and, therefore, the rate should be identical. However, it is apparent that, just as the future use to which an article may be put has no bearing upon its inherent character for rate purposes, the nature of the business of the shipper likewise can have no bearing on the status of the material for rate purposes. In *Lapides Metals Co. v. B. & M. R. R. Co.*, 478 I.C.C. 214, the scrap rate was held inapplicable to a shipment of aluminum airplane cylinder heads which were purchased from the War Assets Administration as surplus scrap by the shipper who was in the scrap iron and steel business exclusively, and who actually remelted the cylinder heads to recover the aluminum content. The rate for airplane cylinder parts was held applicable:

> "The commodity comprising the shipment was manufactured for and bought by the Armed Forces for use as airplane aluminum heads. There is no evidence that cessation of hostilities converted them into something different."

278 I.C.C. at p. 215.

Plaintiff's assumption that the scrap iron and steel dealers who purchased automotive parts of the type that plaintiff purchased would be charged the scrap iron rate is not well founded. Furthermore, the parties have not set out in their stipulation of facts any indication that the scrap iron and steel dealers would be charged the lower rate, and this assumed fact cannot be taken into consideration in passing on this motion for summary judgment.

Plaintiff has suggested that the facts and holding of *Sonken Galamba Corp. v. Union Pac. R. Co.*, 10 Cir. 1944, 145 F.2d 808, are closely analogous to the situation presented here. In that case it was held that the scrap iron rate was

applicable to shipments of dismantled oil tank-bottoms which were pitted and rusted. The facts of that case are distinguishable from those here. In that case the materials shipped were sections of broken down oil tanks which were in bad condition when shipped. In this case, the automotive parts were whole and complete, and, although it would be economically impracticable to recondition many of the parts, the decision to recondition or not rests upon consideration of not only the physical condition of the parts, but upon many other factors such as the relation of the scrap market to the automotive parts market, which factors are of course immaterial in determining the status of the parts for rate purposes. Conceivably a particular part could be in very poor condition, but, because of a low scrap market and a favorable parts market, or because of a heavy demand for that particular kind of part, plaintiff could decide to recondition the part rather than scrap it.

Plaintiff has also contended that at least a portion of the parts shipped were scrap under any definition and that plaintiff; at the least, should be entitled to recover the difference between the rate paid on this portion and the lower applicable scrap rate. Even assuming that some of the parts were scrap under any definition, although the Court does not now pass upon this question, it does not appear that a court or jury could determine what amount was scrap without entering into the realm of speculation and conjecture. Plaintiff has admitted in the stipulation of facts that "plaintiff has no records to establish with accuracy the quantity of each shipment which has been sold for scrap or which has been reconditioned and sold as automotive parts. The balance of such shipments on hand in plaintiff's storage yard is being kept by plaintiff awaiting future decision as to what shall be scrapped and what shall be reconditioned and sold." It appears that there is no separation of parts at the time of shipment, and that upon arrival in Minneapolis, some of the parts are immediately scrapped, but substantial amounts are stored to be disposed of later. The failure of plaintiff to keep records as to the disposition of the parts makes it impossible to determine with any accuracy how many of the parts were actually scrap, even assuming that such records would be

competent to show the nature and character of the automotive parts at the time of shipment.

It is concluded, as a matter of law, that the tariff classification for scrap iron and steel is inapplicable to the automotive parts shipped by plaintiff.

Defendant's motion for summary judgment is granted.

Dated this 12 day of April, 1956.

EDWARD J. DEVITT,
United States District Judge.

Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co., et al
(8 Cir. 1957), 240 F.2d 743.

Before SANBORN, WOODROUGH and JOHNSEN, Circuit Judges.

WOODROUGH, Circuit Judge.

These actions were brought by appellant against the several named railroads, appellees herein, to recover alleged freight overcharges collected from appellant in connection with various carload shipments transported by the several carriers, and delivered to the appellant at Minneapolis. Each particular appellee was sued on account of each shipment delivered by it.

The plaintiff alleged in the first count of its complaint against defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company that the court had jurisdiction under Title 28, U.S.C.A., Section 1337, and that on or about October 19, 1953, there was consigned to plaintiff at Minneapolis, Minnesota, from Mira Loma, California, a carload shipment of scrap iron or steel and that said shipment was transported by various carriers in car No. UP 22983 and was delivered to the plaintiff by defendants. That the lawful freight charge, including tax, for the transportation of said car of scrap iron or steel was in the amount of $833.00, but that the defendant demanded and received of the plaintiff $2,040.00 on account thereof. That by reason of the facts alleged, defendant is indebted to plaintiff in the amount of $1,207.00.

The complaint contained five similar counts, each alleging a shipment of scrap iron or steel, a lawful freight charge of a certain amount, and an overcharge. The prayer was for $3,562.73 with interest.

The defendants, admitting federal jurisdiction, answered that the shipments referred to in the complaint were respectively of "tractor treads, old, used, having value only for reconditioning," or "auto parts, engine parts, and parts other than body parts, having value for reconditioning only," and that the charges made and collected were in accord with the lawful published and filed tariffs, rules, regulations, classifications and schedules of rates and charges required by the Act of Congress entitled "An Act to Regulate Commerce," passed February 4, 1887.

For the purpose of a motion for summary judgment for defendant, a stipulation of facts was entered into and filed as follows:

"Stipulation of Facts.

"It Is Hereby Stipulated and Agreed by and between the parties hereto through their respective attorneys that for the sole purpose of defendants' Motion for Summary Judgment, the following facts may be accepted as true and correct; and in the event that said Motion is denied, it is understood that none of said statements in this Stipulation shall be binding upon any of the parties nor shall in any way be construed as an admission against them.

"1. The general nature of plaintiff's business includes the handling of parts for obsolete vehicles, such as Army vehicles which are no longer being manufactured. It purchases new and used parts surpluses from the Government and companies that are scrapped or obsolete in their stocks and tries to merchandise them. Such purchases are brought to a yard maintained in Minneapolis. Shipments are loaded at point of purchase with no attempt at sorting or segregation. Upon arrival at Minneapolis the shipments are unloaded and certain portions of each shipment are scrapped upon arrival. The balance of such shipments are stored for future disposition either through scrapping or reconditioning. Plaintiff

does not have facilities for smelting and whenever any part of a shipment is scrapped, whether upon arrival or at a later date, the same is sold to scrap jobbers.

"2. The shipments involved in the pleadings were purchased from the United States Army as the result of published lists of material by the Government which were obsolete and overstocked on behalf of the Government or which, because of condition, were no longer of useful service. The material is listed only by general description and purchases are made on the basis of competitive bids submitted by prospective purchasers. Bids submitted by plaintiff are on a tonnage or poundage basis in competition with regular scrap iron and steel dealers and are usually slightly higher than the then prevailing market price of scrap, except that on some occasions it would be substantially higher.

"3. Said shipments were purchased from the Army for the purpose of movement to the yard of plaintiff in Minneapolis. It was the intention of plaintiff to recondition and sell as automotive parts so much of each shipment as might become economically feasible and practical. After the shipments have been stored, there are periodic checks at irregular intervals and additional amounts are scrapped. Substantial amounts of parts have the physical capacity to be reconditioned, but the following factors will determine from time to time the decision as to whether to recondition or scrap:

(a) Anticipated market for reselling.
(b) Receipt of order for particular parts.
(c) Economic cost of reconditioning.
(d) Sufficiency of reserve capital.
(e) Condition of the scrap market.
(f) Amount of plaintiff's storage space.
(g) Physical condition of the parts.
(h) Size of stock of particular parts on hand.

"4. All of the units in said shipments maintain their original identity at the time of shipment and ultimately are either scrapped or reconditioned for sale as automotive parts. Many of the units upon arrival in Minneapolis are so rusty and worn, or otherwise unfit for use,

as to make it impractical economically to recondition them.

"5. Plaintiff has no records to establish with accuracy the quantity of each shipment which has been sold for scrap or which has been reconditioned and sold as automotive parts. The balance of such shipments on hand in plaintiff's storage yard is being kept by plaintiff awaiting future decision as to what shall be scrapped and what shall be reconditioned and sold. Plaintiff's experience in similar shipments over the years is such that on the average approximately ten per cent (10%) of shipments are reconditioned and sold as automotive parts and ninety per cent (90%) are eventually sold for scrap.

"6. Originally, similar shipments moved by rail from point of purchase by plaintiff to its yard at Minneapolis under the classification of 'Scrap, Auto Parts.' Later, other similar shipments were reclassified at 85% Scrap Iron and Steel and 15% Used Auto Parts for reconditioning purposes only. In some instances involved herein the material was described in the Bills of Lading as 'auto parts and engine parts, old, used, having value for reconditioning.' In other instances the material was originally described as 'scrap iron, etc.,' but as to the latter shipments, the defendant railroads changed the Bills of Lading to read 'auto parts and engine parts, old, used, having value for reconditioning.' In every case plaintiff paid the higher rate based on the latter classification and this action seeks recovery of the difference between the rate paid and the lower rate applicable to 'scrap iron, etc.'

"It Is Hereby Stipulated and Agreed by and between the parties hereto that defendants' Motion for Summary Judgment may be submitted to the Court herein; and in the event that the Court or either party wished oral argument, the parties will stipulate to a time and place at the Court's convenience for submission of said argument; and that upon the filing of said Motion, defendants shall have seven (7) days in which to submit a written brief and plaintiff shall have seven (7) days in

which to answer said brief. Defendants shall then have three (3) days in which to reply to plaintiff's brief."

Defendants' motion was in general terms for summary judgment in each of the actions "upon the files and proceedings" and "on the stipulation of facts" and was submitted to the court on briefs and oral argument. The judgments sustaining the motion in each of the actions and summarily dismissing each action was accompanied by the opinion of the court published at 139 F. Supp. 521. The actions were consolidated for purposes of appeal.

The position of the plaintiff-appellant is that the trial court erred in granting summary judgment and the only contention it presents for reversal is that there was a genuine issue of fact in each of the cases on which plaintiff was entitled to trial. It argues that "if this case had been submitted to the trial court on the same stipulation of facts, not on a Motion for Summary Judgment, but for the determination of all issues by the Court, the appellant might well concede that there was a basis for the conclusion which the Court reached." It cites the settled law, fully recognized by this Court, that under Rule 56(c), Federal Rules of Civil Procedure, a summary judgment upon motion therefor by a defendant should never be entered except where the defendant is entitled to its allowance beyond all doubt; only where the conceded facts show defendant's right with such clarity as to leave no room for controversy; with all reasonable doubts touching the existence of a genuine issue as to a material fact resolved against the movant; giving the benefit of all reasonable inferences that may reasonably be drawn from the evidence to the party moved against. "That one reasonably may surmise that the plaintiff is unlikely to prevail upon a trial is not a sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." *Sprague v. Vogt*, 150 F.2d 795; *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213; *Union Transfer Co. v. Riss & Company*, 218 F.2d 553; *Caylor v. Virden*, 217 F.2d 739.

When we turn to the pleadings, stipulation of facts, and the decision brought here for review, it must be observed

that the controversy is in a field that has been productive of considerable litigation. The courts and the Interstate Commerce Commission have been required to decide whether shipments involved in cases before them were "scrap iron or steel" or were within some other classification for freight rate purposes in a number of cases. The decisions establish as a firm principle that it is the nature and character of a shipment at the point and time of origin that determines whether or not it is scrap iron or steel for rate purposes, and both parties here concede that point, citing *Larrimore, Inc., v. Union Pacific R. R. Co.*, 273 I.C.C. 415, and *Sonken-Galamba Corporation v. Union Pacific R. R. Co.*, 145 F.2d 808. The recognition of that principle does not, however, foreclose all honest controversy as to what the "nature and character" of a particular shipment is for the fixing of rates.

It appeared to the trial court that the only question for decision was whether the tariff Item was applicable to the shipments. It held the nature and character of the shipment involved here were shown to have been other than scrap iron or steel by the agreed facts as a matter of law, and it stated, among the elements controlling decision, that "the plaintiff has no records to establish with accuracy the quantity of each shipment which has been sold for scrap or which has been reconditioned and sold as automotive parts." And that "there was no separation of parts at the time of shipment, and upon arrival in Minneapolis, some of the parts are immediately scrapped, but substantial amounts are stored to be disposed of later." And "the failure of plaintiff to keep records as to the disposition of the parts makes it impossible to determine with any accuracy how many of the parts were actually scrap, even assuming that such records would be competent to show the nature and character of the automotive parts at the time of shipment." The Court also observed, "Even assuming that some of the parts were scrap under any definition, although the Court does not now pass upon this question, it does not appear that a court or jury could determine what amount was scrap without entering into the realm of speculation or conjecture." The Court "concluded, as a matter of law, that the tariff classification for scrap iron and steel is inapplicable to the automotive parts shipped by plaintiff." c.f. 139 F. Supp. pp. 524, 525.

The appellant has concentrated its attack against the above summary judgment on the Court's conclusion that plaintiff could not make proof of its claims. It is argued for appellant that the Court was not justified in asserting that Court or jury "could not determine what amount was scrap without entering into the realm of speculation and conjecture." It points out that in the main case relied on by the parties and the Court, *(Sonken-Galamba*, 145 F.2d 808, *supra)* the plaintiff, claiming to be obligated only for freight charges for scrap, was granted reversal of a judgment charging it with the rates applicable to "steel plates." Although circumstances analogous to those noted here were present, in that the shipments of "tank bottom plates" there involved were "thrown loosely in an open car" and no record appears to have been kept as to the condition of any of the pieces at the time, both the trial court and the appellate court were able to and did make findings as to the nature and character of the shipment. The trial court found "that the shipments were not scrap iron as defined in the tariff," and the appellate court said, "the evidence is also conclusive that only about 5% of this particular class of material was used for any other purpose than remelting. Thus it is clear from the evidence that predominantly the only value attributable to these tank bottoms was for remelting purposes only."

Likewise in *Crancer et al v. Lowden*, 121 F.2d 645, and *Atchison, T. & S. F. Ry. Co. v. United States ex rel. Sonken-Galamba Corp.*, 98 F.2d 457, decided by this Court, where the question was whether or not the material shipped was scrap iron or steel, there is no reference to any record made at the time of the shipment to distinguish between the character and nature of parts of the material. In the first case the Court said of the shipments: "The articles were shipped in open coal cars. The good and the bad were commingled, were loose in the cars * * *," and in the second, the Court referred to "these plates derived from dismantled tanks." Yet the question whether the material was or was not scrap was deemed to be justiciable, and was decided on the evidence adduced.

The appellant insists that it can make proof, notwithstanding the admissions of the stipulation, that will entitle

it to at least some recovery for overcharge on its shipments, and that its claim is made in good faith in full view of the authoritative precedents and is not sham or frivolous or unsubstantial.

It does not specify the testimony which it intends to adduce at a trial, but it may be inferred that it would attempt to support the general allegations of its complaint by evidence that the high cost of screening the pieces of the shipment that are fit for reconditioning, and handling them, and the small percentage that will be found fit for or that will ever be applied to any use except remelting, leaves small value in the shipments except for remelting. In argument it also stresses that scrap dealers were the competitors in the bidding at which plaintiff bought the pieces in the shipment from the government as indicating that the pieces shipped were treated as scrap by those informed.

But when we consider the generality of the complaint and of the motion for summary judgment, and then the particulars of the stipulation on which the judgment was rested, and the reasoning of the Court, it appears that the two different matters of construing the tariff and passing on the question of reasonableness have been treated as one.

It may well be that if the words of the tariff defining scrap iron or steel as "having value for remelting purposes only" are to be applied as absolute and so strictly as to preclude any margin of tolerance, then the stipulation that "substantial amounts of parts have physical capacity to be reconditioned," and that on competitive sales they brought "slightly higher and on occasion substantially higher bids than prevailing market prices of scrap," and "all of the units * * * maintain their original identity," and "are either scrapped or reconditioned for sale as automotive parts" would compel the conclusion, ruling and judgment complained of.

But manifestly, the plaintiff's position is that if the tariff should be so construed and applied to these shipments, it would be unreasonable and violative of the intent of the Act. The broad pleading that the proper rate was a certain sum (which was the rate for scrap) left it open to the plaintiff to so contend. But it appeared to the trial court that no question could be presented as to the reasonableness of the

rates charged. The Court said: "That is not within our province. * * * The sole issue is as to the nature of the material shipped for rate purposes. This is the only issue the court is empowered to decide. See *Sonken-Galamba Corp. v. Union Pacific R. R. Co.*, * * *." 139 F. Supp. p. 523.

After the submission of this case to the trial court and the submission of the appeal to this Court, the Supreme Court rendered decisions on December 3, 1956, in *United States v. Western Pacific Railroad Company* and *United States v. Chesapeake and Ohio Railway Company* which deal directly with the determination of disputed transportation charges by railroads.

In the first case, railroads sued in the Court of Claims to recover from the United States, as shipper, the difference between tariff rates actually paid and those allegedly due on Army shipments of steel aerial bomb cases filled with napalm gel (i.e. gasoline thickened with aluminum soap powder) to which burster and fuse had not yet been added. The shipments were billed as "incendiary bombs" but the General Accounting Office made deductions on the ground that the shipments should have been carried at the lower rate applicable to "gasoline in steel drums." In answer to the railroad's suit for the difference, the government contended that the absence of burster and fuse deprived the bombs of the essential characteristic of incendiary bombs, and if the tariff item was allowed to govern, it would be unreasonable as to the shipments and as to that issue the court proceedings should be suspended and the matter referred to the Interstate Commerce Commission.

The Court of Claims had held on motion for summary judgment that the shipments were incendiary bombs entitled to the higher rate. It assumed, as did the district court in this case, that whether the higher rate applied was a matter simply of tariff construction. It regarded reasonableness of the tariff, as applied to the shipments, as within the initial competence of the Interstate Commerce Commission, but held that the running of the two year period of limitations, provided by sec. 16(3) of the Interstate Commerce Act, cut off the right of referral to the Commission.

The Supreme Court of its own motion announced its con-

clusion that in the circumstances of the case "the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission." The Court developed at length in the opinion the doctrine of primary jurisdiction and the reasons for it citing the precedents, and declared that where the questions of construction of a tariff and its reasonableness are so intertwined that the same factors are determinative on both issues, then it is the Commission which must first pass on them.

The problem of deciding in this case whether plaintiff's shipments were "scrap iron or steel having value for remelting purposes only" involves many of the same considerations expressed by the Supreme Court in regard to the problem in the *Western Pacific* case. The record here gives us no inkling of the factors that produce the scrap iron rates or the rate on "automotive engine parts other than automobile bodies, old, used, having value for reconditioning," or what it is that justifies the difference between the rates. All that the Supreme Court said in the *Western Pacific* case as to the necessity for "expert and specialized knowledge" in that case is applicable here, and it must be held here in accord with the teaching of the *Western Pacific* case that the question of the tariff construction, as well as that of the reasonableness of the tariff as applied, are within the exclusive primary jurisdiction of the Interstate Commerce Commission.

In the other case decided on December 3, *United States v. Chesapeake & Ohio Railway Company*, the question was whether certain shipments by the United States took the export rate which was lower or the domestic rate which was higher. The Court said that it faced the same question as that dealt with in the *Western Pacific* case, namely: "does the issue of tariff construction, which the Court of Appeals regarded as one for the court, involve such acquaintance with rate-making and transportation factors as to make the issue initially one for the Interstate Commerce Commission under the doctrine of primary jurisdiction?" The decision followed *United States v. Western Pacific R. Co.* and the case was remanded to the Court of Appeals.

As to the Statute of Limitations.

49 *U.S.C.A.*, Section 16(3)(c), provides that complaints against carriers for overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and there is no doubt in this case that the time has elapsed within which the plaintiff in this case could bring an original proceeding for recovery of the alleged overcharges by way of reparation before the Commission. But as declared by the Supreme Court in the *Western Pacific* case, *supra*, "Section 16(3) does not deal with referral of questions to the Commission incident to judicial proceedings." This action was brought in the district court within the two-year period, Section 16(3)(b), and at that time there was reason to believe that it could be maintained without recourse to the Interstate Commerce Commission.

We think it must be held under the two Supreme Court decisions of December 3, 1956, and the decision of this Court in *United States v. Kansas City Southern Ry. Co.*, 217 F.2d 763, that Section 16 does not bar referral of the controversy to the Interstate Commerce Commission.

In the three controlling cases the government was party defendant owing to the power it has through the General Accounting Office to deduct its claims against its debtors from amounts it owes them, and to that extent the ruling that Section 16(3) did not bar the proceedings before the Interstate Commerce Commission sanctioned in the three cases might be distingnished from a referral of this case to the primary jurisdiction of that body. But we infer from the following expressions of the opinion of the Supreme Court in the *Western Pacific* case that inasmuch as the litigation in this case is not stale, no issue in it can be deemed stale, and the statute of limitations does not bar the referral. The Court said:

> "We may assume, without deciding, that the Government would have been barred by section 16(3) from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. Respond-

ents in effect ask us to hold that a suit may be brought for six years but that certain defenses thereto may be raised only for two years. Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.

"Section 16(3) does not deal with referral of questions to the Commission incident to judicial proceedings. On its face it has to do only with the commencement of actions or reparation proceeding before the Commission. There is therefore no language which militates against the conclusion that the statute does not apply to referrals. More important, the basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale."

The judgment appealed from and the ruling on the motion for summary judgment are reversed and the case is remanded with direction to refer the controversy as to the alleged overcharges to the Interstate Commerce Commission and retain jurisdiction of the case pending proceedings before that body.

Reversed and Remanded with Directions.

JUDGMENTS APPEALED FROM

(Judgment in Cause No. 15611.)

United States Court of Appeals
for the
Eighth Circuit

No. 15611 — September Term, 1956.

Thursday, January 17, 1957.

Northwestern Auto Parts Company, a corporation,
Appellant,

vs.

Chicago, Burlington & Quincy Railroad Company,
a corporation.

Appeal from the United States District Court
For the District of Minnesota.

This cause came on to be heard on the Record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged, by this Court that the judgment of the said District Court appealed from in this cause and the ruling on the motion for summary judgment are hereby reversed with costs; and that the Northwestern Auto Parts Company, a corporation, have and recover against the Chicago, Burlington & Quincy Railroad Company, a corporation, the sum of Twenty-five and no/100 ($25.00) Dollars docketing fee of the appeal in this Court, and the further sum of Sixteen and 63/100 ($16.63) Dollars, being one-fourth of the taxable cost of printing the Record in this Court in this and the companion cases, No. 15612, No. 15613 and No. 15614.

And it is further Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with direction to refer the controversy as to the alleged overcharges to the Interstate Commerce Commission and retain jurisdiction of the case pending proceedings before that body.

January 17, 1957

(Judgment in Cause No. 15612.)

United States Court of Appeals
for the
Eighth Circuit

No. 15612 — September Term, 1956.
Thursday, January 17, 1957.

Northwestern Auto Parts Company, a corporation,
Appellant,

vs.

Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation.

Appeal from the United States District Court
For the District of Minnesota.

This cause came on to be heard on the Record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause and the ruling on the motion for summary judgment are hereby reversed with

costs; and that the Northwestern Auto Parts Company, a corporation, have and recover against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the sum of Twenty-five and no/100 ($25.00) Dollars docketing fee of the appeal in this Court, and the further sum of Sixteen and 63/100 ($16.63) Dollars, being one-fourth of the taxable cost of printing the Record in this Court in this and the companion cases, Nos. 15611, 15613 and 15614.

And it is further Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with direction to refer the controversy as to the alleged overcharges to the Interstate Commerce Commission and retain jurisdiction of the case pending proceedings before that body.

January 17, 1957.

(Judgment in Cause No. 15613.)

United States Court of Appeals
for the
Eighth Circuit

No. 15613 — September Term, 1956.
Thursday, January 17, 1957.

Northwestern Auto Parts Company, a corporation,
Appellant,

vs.

Great Northern Railway Company, a corporation.

Appeal from the United States District Court
For the District of Minnesota.

This cause came on to be heard on the Record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause and the ruling on the motion for summary judgment are hereby reversed with costs; and that the Northwestern Auto Parts Company, a corporation, have and recover against the Great Northern Railway Company, a corporation, the sum of Twenty-five and no/100 ($25.00) Dollars docketing fee of the appeal in this Court, and the further sum of Sixteen and 62/100 ($16.62) Dollars, being one-fourth of the taxable cost of printing the Record in this Court in this and the companion cases, No. 15611, No. 15612 and No. 15614.

And it is further Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with direction to refer the controversy as to the alleged overcharges to the Interstate Commerce Commission and retain jurisdiction of the case pending proceedings before that body.

January 17, 1957.

(Judgment in Cause No. 15614.)

United States Court of Appeals
for the
Eighth Circuit

No. 15614 — September Term, 1956.
Thursday, January 17, 1957.

Northwestern Auto Parts Company, a corporation,
Appellant,

vs.

Minneapolis & St. Louis Railway Company, a corporation.

Appeal from the United States District Court
For the District of Minnesota.

This cause came on to be heard on the Record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause and the ruling on the motion for summary judgment are hereby reversed with costs; and that the Northwestern Auto Parts Company, a corporation, have and recover against the Minneapolis & St. Louis Railway Company, a corporation, the sum of Twenty-five and no 100 ($25.00) Dollars docketing fee of the appeal in this Court, and the further sum of Sixteen and 62/100 ($16.62) Dollars, being one-fourth of the taxable cost of printing the Record in this Court in this and the companion cases, No. 15611, No. 15612 and No. 15613.

And it is further Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with direction to refer the controversy as to the alleged overcharges to the Interstate Commerce Commission and retain jurisdiction of the case pending proceedings before that body.

January 17, 1957.

ORDER DENYING JOINT PETITION FOR REHEARING

(Order Denying Joint Petition for Rehearing in Causes Nos. 15611, 15612, 15613 and 15614.)

United States Court of Appeals
for the
Eighth Circuit

September Term, 1956
Monday, March 4, 1957

Northwestern Auto Parts Company,
No. 15611. vs. Appellant,
Chicago, Burlington & Quincy Railroad Company.

Northwestern Auto Parts Company,
No. 15612. vs. Appellant,
Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Northwestern Auto Parts Company,
No. 15613. vs. Appellant,
Great Northern Railway Company.

Northwestern Auto Parts Company,
No. 15614. vs. Appellant,
Minneapolis & St. Louis Railway Company.

Appeals from the United States District Court
For the District of Minnesota.

Joint petition for rehearing filed by appellant and appellees in these causes having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

March 4, 1957.

MATERIAL TEXT OF STATUTES INVOLVED

Title 28, U.S.C., Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Title 28, U.S.C., Section 1254:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

Title 49, U.S.C., Section 9:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

Title 49, U.S.C., Section 16(3)(a):

"(3) (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after."